

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 August Term 2002

5 (Argued April 8, 2003 Decided March 2, 2004)

6 Docket No. 02-1638

7 -----x
8 UNITED STATES OF AMERICA,

9
10 Appellant,

11 -- v. --

12
13 DONALD FELL,

14
15 Defendant-Appellee.
16
17

18 -----x
19
20 B e f o r e : WALKER, Chief Judge, WINTER, Circuit Judge, and
21 CARMAN, Judge.¹

22 The government appeals the September 24, 2002 order of the
23 United States District Court for the District of Vermont (William
24 K. Sessions, III, District Judge) declaring the Federal Death
25 Penalty Act, 18 U.S.C. §§ 3591 et seq., unconstitutional and
26 striking the jury's notice of special findings from the
27 indictment as well as the government's notice of intent to seek
28 the death penalty.

29 Vacated and Remanded.

30 ROBERT J. ERICKSON, Deputy Chief,
31 Appellate Section, Criminal Division,
32 United States Department of Justice,
33 Washington, D.C. (Peter W. Hall, United
34 States Attorney for the District of

¹ The Honorable Gregory W. Carman, Judge of the United States Court of International Trade, sitting by designation.

Vermont, Burlington, VT, on the brief),
for Appellant

ALEXANDER BUNIN, Federal Public
Defender, Albany, NY (Gene V. Primomo,
Assistant Federal Public Defender,
Albany, NY, Paul S. Volk, Blodgett,
Watts & Volk, Burlington, VT, and Adam
Thurschwell, of counsel, on the brief),
for Defendant-Appellee

JOHN M. WALKER, JR., Chief Judge:

At issue in this case is whether the Federal Death Penalty
Act of 1994 (the "FDPA"), Pub. L. No. 103-322, Title VI,
§§ 60002(a), 108 Stat. 1959 (Sept. 13, 1994) (codified at 18
U.S.C. §§ 3591 et seq.), is unconstitutional because § 3593(c) of
the FDPA permits the admission of evidence at the penalty phase
of a capital trial that would not be admissible under the Federal
Rules of Evidence ("FRE"). Under the FDPA, evidence may be
excluded where "its probative value is outweighed by the danger
of creating unfair prejudice, confusing the issues, or misleading
the jury." 18 U.S.C. § 3593(c). In a September 24, 2002 Opinion
and Order, the United States District Court for the District of
Vermont (William K. Sessions, III, District Judge), held that
this provision of the FDPA was unconstitutional on the ground
that "the FDPA's § 3593(c)'s direction to ignore the rules of
evidence when considering information relevant to death penalty
eligibility is a violation of the Due Process Clause of the Fifth
Amendment and the rights of confrontation and cross-examination
guaranteed by the Sixth Amendment ["Constitutional Rights"]."

1 United States v. Fell, 217 F. Supp. 2d 469, 473 (D. Vt. 2002).

2 We disagree.

3 While it is true that the FRE are inapplicable to death
4 penalty sentencing proceedings under the FDPA, the FRE are not
5 constitutionally mandated. Indeed, the FRE are inapplicable in
6 numerous contexts, including ordinary sentencing proceedings
7 before a trial judge. See Fed. R. Evid. 1101(d).² Moreover, the
8 FDPA does not alter a district court's inherent obligation to
9 exclude evidence the admission of which would violate a
10 defendant's Constitutional Rights. The admissibility standard
11 set forth in § 3593(c) of the FDPA provides one means of
12 complying with this responsibility. Accordingly, the judgment of
13 the district court is vacated and the case is remanded for
14 further proceedings.

15 BACKGROUND

16 Donald Fell was indicted on four counts relating to the
17 abduction and murder of Teresca King in late November 2000.
18 Counts 1 and 2 charged Fell with carjacking and kidnapping.
19 Because the charged crimes resulted in death, both counts were

² In fact, Judge Winter is of the view that, even in the absence of the express language of the FDPA, the FRE would be inapplicable to a capital penalty phase under Fed. R. Evid. 1101(d)(3), which states that the FRE are inapplicable to all sentencing proceedings, and 18 U.S.C. § 3661, which provides, "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." The other panel members express no view on this point.

1 charged as capital crimes. On January 30, 2002, the government
2 filed a Notice of Intent to Seek the Death Penalty, which set
3 forth certain statutorily defined aggravating factors the
4 government believed to be implicated in the case. In the summer
5 of 2002, following the Supreme Court's decision in Ring v.
6 Arizona, 536 U.S. 584 (2002), the grand jury issued a superseding
7 indictment that included a Notice of Special Findings reiterating
8 the same aggravating factors noticed by the government six months
9 earlier. In addition, the government issued a Supplemental
10 Notice of Intent to Seek the Death Penalty, in which it
11 identified several non-statutory aggravating factors it believed
12 to also be applicable to the case, as permitted by the FDPA. See
13 18 U.S.C. § 3592(c) (permitting jury to consider any non-
14 statutory aggravating factor for which notice was given); United
15 States v. Jones, 132 F.3d 232, 239-40 (5th Cir. 1998) (holding
16 that government's authority to define non-statutory aggravating
17 factors is not an unconstitutional delegation), aff'd on other
18 grounds, 527 U.S. 373 (1999).

19 The defendant moved pre-trial to have the FDPA declared
20 unconstitutional on numerous grounds. See Fell, 217 F. Supp. 2d
21 at 473-74 (listing claims). The district court addressed only
22 two of them. It first held that nothing in the FDPA precluded
23 the government from having the grand jury issue an indictment
24 concerning the existence of aggravating factors. This ruling is

1 not a subject of this appeal.

2 The district court next addressed the defendant's claim that
3 the assertedly relaxed evidentiary standard applicable during the
4 penalty phase of trial pursuant to § 3593(c) (the "FDPA
5 Standard") renders unconstitutional any jury findings as to the
6 existence of one or more of the aggravating factors necessary to
7 impose a sentence of death. The defendant asserted that the FDPA
8 Standard would permit the government to introduce statements made
9 by the defendant's now-deceased co-defendant that inculpated the
10 defendant with respect to one or more of these aggravating
11 factors, but that these statements would not be admissible under
12 the FRE. The district court agreed that the FDPA Standard was
13 unconstitutional and struck the grand jury's Notice of Special
14 Findings from the indictment as well as the government's
15 Supplemental Notice of Intent to Seek the Death Penalty. This
16 appeal followed.

17 DISCUSSION

18 I. Appellate Jurisdiction

19 We have jurisdiction to entertain this interlocutory appeal
20 pursuant to 18 U.S.C. § 3731,³ which permits an immediate appeal

³ Title 18 U.S.C. § 3731 provides:

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy

1 of any district court decision that, inter alia, dismisses any
2 part of a criminal indictment. See United States v. Quinones,
3 313 F.3d 49, 56-57 (2d Cir. 2002) (holding that courts of appeals
4 have "jurisdiction [under § 3731] to entertain appeals by the
5 Government where a district court has stricken a death penalty
6 notice" and collecting similar cases); see also United States v.
7 Wilson, 420 U.S. 332, 337 (1975) (holding that § 3731 is to be
8 construed broadly "to allow [government] appeals whenever the
9 Constitution would permit").

10 II. Ripeness

11 Although neither the district court nor any of the parties
12 has addressed the question, as a threshold matter we must
13 determine whether the defendant's challenge to the FDPA Standard
14 is ripe for consideration, or whether, instead, the district
15 court properly should have dismissed the claim as premature. See
16 United States v. Sampson, 245 F. Supp. 2d 327, 338-39 (D. Mass.
17 2003) (discussing ripeness of constitutional challenge to FDPA
18 Standard when raised before trial); see also Quinones, 313 F.3d
19 at 57-60 (discussing ripeness of different constitutional
20 challenge to the FDPA).

clause of the United States Constitution prohibits further
prosecution. . . .

. . . .

The provisions of this section shall be liberally
construed to effectuate its purposes.

1 “Ripeness is a constitutional prerequisite to exercise of
2 jurisdiction by federal courts. The Court, therefore, can raise
3 the issue sua sponte.” Nutritional Health Alliance v. Shalala,
4 144 F.3d 220, 225 (2d Cir. 1998) (internal citations omitted);
5 see also Quinones, 313 F.3d at 57-58. At the core of the
6 ripeness doctrine is the necessity of “ensur[ing] that a dispute
7 has generated injury significant enough to satisfy the case or
8 controversy requirement of Article III of the U.S. Constitution”
9 by “prevent[ing] a federal court from entangling itself in
10 abstract disagreements over matters that are premature for review
11 because the injury is merely speculative and may never occur.”
12 Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d
13 83, 90 (2d Cir. 2002). Here, of course, the defendant has not
14 been tried, let alone convicted; thus, he may never be subjected
15 to a penalty phase in which the government has sought to
16 introduce the challenged evidence.

17 In order to determine whether an issue is ripe for
18 adjudication, a court must make a fact-specific evaluation of
19 “both the fitness of the issues for judicial decision and the
20 hardship to the parties of withholding court consideration.”
21 Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967), overruled on
22 other grounds, Califano v. Sanders, 430 U.S. 99 (1977). In
23 Quinones, a case also involving a pre-trial ruling that the FDPA
24 was unconstitutional, we applied the Abbott Laboratories test,

1 and, in words that apply equally to this appeal, held that

2 due regard for the rights of criminal defendants
3 compels the conclusion that . . . the defendant['s]
4 constitutional challenge to the FDPA was ripe for
5 consideration by the District Court and is ripe for our
6 review. First, the defendant['s] argument clearly was
7 fit for adjudication. A challenge to the facial
8 constitutionality of a criminal statute is a pure
9 question of law [that] . . . ["]is eminently fit for
10 judicial review."

11 . . . [A] defendant suffers practical and legally
12 cognizable disadvantages by postponing a facial
13 challenge to the death penalty until after trial.
14 Quite apart from a defendant's obvious desire to know
15 in advance whether he will be risking his life by going
16 to trial, . . . a defendant may reasonably prefer the
17 ordinary allocation of peremptory challenges – six for
18 the government, ten for the defense – rather than the
19 allocation in a capital case of twenty for each side.
20 . . . [A] defendant may reasonably prefer a jury on
21 which persons who are conscientiously opposed to the
22 death penalty are not excused for cause.

23 Further, if the death penalty remains a
24 possibility during trial, a defendant may be forced
25 into trial tactics that are designed to avoid the death
26 penalty but that have the consequence of making
27 conviction more likely. Moreover, the possibility of
28 capital punishment frequently induces defendants to
29 enter into plea agreements in order to guarantee their
30 own survival. And the Supreme Court has specifically
31 held that "a plea of guilty is not invalid merely
32 because entered to avoid the possibility of a death
33 penalty." Accordingly, to the extent that a defendant
34 might be disposed to plead guilty before trial in order
35 to avoid capital punishment, withholding consideration
36 of a facial challenge to the death penalty until after
37 trial, conviction and sentence could cause him
38 substantial hardship.

39

40 . . . Because both of the factors for ripeness set
41 forth by the Supreme Court in Abbott Laboratories were
42 present when the District Court considered the
43 constitutionality of the FDPA, the defendant['s]
44 constitutional challenge to the FDPA was ripe for
45 consideration by the District Court and is now ripe for
46 our review.

1 Quinones, 313 F.3d at 59-60 (internal citations and footnote
2 omitted).

3 Quinones addressed whether prosecution under the FDPA was
4 unconstitutional, a claim that was raised by a defendant whose
5 prosecution under the statute was certain and imminent. See id.
6 at 52. Although we address a hypothetical evidentiary decision
7 that may never be required, we nevertheless believe the reasoning
8 of Quinones applies with comparable force here. Accordingly, we
9 conclude that Fell's FDPA challenge is ripe for consideration.

10 III. The Federal Death Penalty Act

11 Under the FDPA, if a defendant is convicted of a federal
12 offense that carries the potential of a death sentence, the
13 defendant is entitled to "a separate sentencing hearing to
14 determine the punishment to be imposed." 18 U.S.C. § 3593(b).
15 During this separate hearing, referred to as the sentencing or
16 penalty phase, the jury first considers whether the government
17 has sustained its burden of proving the existence of one or more
18 statutorily defined aggravating factors beyond a reasonable
19 doubt. See 18 U.S.C. § 3593(c). A finding that an aggravating
20 factor exists must be unanimous. 18 U.S.C. § 3593(d). If the
21 jury finds that the government has not sustained its burden of
22 demonstrating the existence of at least one statutory aggravating
23 factor, the death penalty may not be imposed. Id.

24 If the jury finds that the government has sustained its

1 burden in this regard, however, the jury must next

2 consider whether all the aggravating factor or factors
3 found to exist sufficiently outweigh all the mitigating
4 factor or factors found to exist to justify a sentence
5 of death, or, in the absence of a mitigating factor,
6 whether the aggravating factor or factors alone are
7 sufficient to justify a sentence of death.

8 18 U.S.C. § 3593(e). Unlike findings concerning aggravating
9 factors, mitigating factors need be found only by one or more
10 members of the jury and only by a preponderance of the evidence.

11 See 18 U.S.C. §§ 3593(c), (d). "Based upon this consideration,
12 the jury by unanimous vote . . . shall recommend whether the
13 defendant should be sentenced to death, to life imprisonment
14 without possibility of release or some other lesser sentence."

15 18 U.S.C. § 3593(e).

16 Section 3593(c) of the FDPA sets forth the FDPA Standard,
17 which is the evidentiary standard that applies only during the
18 sentencing phase of a capital trial. It provides, in part:

19 Proof of mitigating and aggravating factors.-

20

21 The defendant may present any information relevant to a
22 mitigating factor. The government may present any
23 information relevant to an aggravating factor for which
24 notice has been provided under subsection (a).

25 Information is admissible regardless of its
26 admissibility under the rules governing admission of
27 evidence at criminal trials except that information may
28 be excluded if its probative value is outweighed by the
29 danger of creating unfair prejudice, confusing the
30 issues, or misleading the jury. . . . The government
31 and the defendant shall be permitted to rebut any
32 information received at the hearing, and shall be given
33 fair opportunity to present argument as to the adequacy
34 of the evidence.
35 .

1 of the information to establish the existence of any
2 aggravating or mitigating factor, and as to the
3 appropriateness in the case of imposing a sentence of
4 death. . . . The burden of establishing the existence
5 of any aggravating factor is on the government, and is
6 not satisfied unless the existence of such a factor is
7 established beyond a reasonable doubt. The burden of
8 establishing the existence of any mitigating factor is
9 on the defendant, and is not satisfied unless the
10 existence of such a factor is established by a
11 preponderance of the information.

12 18 U.S.C. § 3593(c) (emphasis added). It is this provision's
13 exception of "the rules governing admission of evidence at
14 criminal trials," namely, the FRE, that is the subject of this
15 appeal. Fell argues that the admission of evidence that is not
16 constrained by the FRE will render a jury's recommendation of a
17 death sentence inherently unreliable.

18 IV. The District Court's Decision

19 The district court held that the FDPA Standard is
20 unconstitutional when viewed in light of the Supreme Court's
21 decisions in Ring v. Arizona, 536 U.S. 584 (2002), Apprendi v.
22 New Jersey, 530 U.S. 466 (2000), and Jones v. United States, 526
23 U.S. 227 (1999), because it denies a defendant the procedural
24 safeguards guaranteed by the Due Process Clause of the Fifth
25 Amendment and the confrontation and cross-examination guarantees
26 of the Sixth Amendment with respect to the penalty phase. See
27 Fell, 217 F. Supp. 2d 469, 485-90.

28 In Ring, the Supreme Court held that the aggravating factors
29 necessary for imposition of the death penalty under Arizona's

1 analogous state death penalty act were elements of a capital
2 crime, such that they had to be submitted to a jury and proved
3 beyond a reasonable doubt in conformity with the reasoning of
4 Apprendi. See Ring, 536 U.S. at 609. Unlike the Arizona death
5 penalty statute, however, the FDPA does require the issue of
6 aggravating factors to be submitted to a jury for determination
7 beyond a reasonable doubt, which is all that was at issue with
8 respect to Ring's application of Apprendi to a death penalty
9 statute. Moreover, following the Ring decision, the government
10 in this case, in an exercise of caution, resubmitted the case to
11 the grand jury to enable it to issue an indictment that included
12 a notice of special findings in which it set forth specific
13 aggravating factors it found to be applicable. Thus, here there
14 is no dispute that there has been literal compliance with the
15 mandates of Ring and Apprendi.

16 Nevertheless, the district court reasoned that in light of
17 the trend in Supreme Court rulings concerning the Constitution's
18 Indictment Clause, it was not enough to have the case comply with
19 Ring. Rather, consideration had to be given to whether the
20 Supreme Court's reasoning in these cases affects a defendant's
21 rights during a capital sentencing phase with respect to the
22 "full" or "entire panoply of criminal trial procedural rights."
23 Fell, 217 F. Supp. 2d at 477, 489 (internal quotation marks
24 omitted).

1 Following this line of analysis, the district court found
2 that the inapplicability of the FRE to capital penalty phases was
3 inconsistent with the Supreme Court's repeated admonition that
4 "heightened reliability" is required of cases that impose the
5 death penalty. Id. at 476-77. Both the government and the
6 district court appear to have agreed with defendant that the
7 statements of his dead co-defendant would be inadmissible under
8 the FRE but admissible at the penalty phase under the FDPA.
9 Fell, 217 F. Supp. 2d at 485. Yet admission of this evidence,
10 according to the district court, would be wholly unreliable. Id.
11 at 486.

12 The district court also noted that under the reasoning of
13 Apprendi, former sentencing factors that are held to be elements
14 of the crime, such as drug quantity, are thereafter to be
15 submitted to the jury and found beyond a reasonable doubt. Id.
16 at 488. By necessary implication, the district court reasoned,
17 such elements, which had formerly been found by a district court
18 judge who was not bound by the FRE, see Fed. R. Evid. 1101(d)(3),
19 were now to be found by a jury on the basis of evidence
20 constrained by the FRE. Fell, 217 F. Supp. 2d at 488. In light
21 of this significant change in procedures, the district court
22 concluded that it was inconceivable that Congress would have
23 intended to single out elements of the death penalty as the only
24 criminal elements to be found by a jury that was unconstrained by

1 the FRE. Id.

2 The district court also held that no alternate construction
3 of the FDPA was possible and, thus, that the constitutional
4 question presented by the FDPA Standard could not be avoided, and
5 further, that the FDPA Standard was not severable from the rest
6 of the FDPA because it was an integral part of the statute and
7 its omission would substantially alter it. Id. at 489 & n.10.
8 As a result, the district court concluded that “the FDPA, which
9 bases a finding of eligibility for imposition of the death
10 penalty on information that is not subject to the Sixth
11 Amendment’s guarantees of confrontation and cross-examination,
12 nor to rules of evidentiary admissibility guaranteed by the Due
13 Process Clause to fact-finding involving offense elements, is
14 unconstitutional.” Id. at 489.

15 V. Flaws with the District Court’s Reasoning

16 We fully agree with the district court that “heightened
17 reliability” is essential to the process of imposing a death
18 sentence. As the Supreme Court has repeatedly emphasized, “the
19 Constitution places special constraints on the procedures used to
20 convict an accused of a capital offense and sentence him to
21 death. The finality of the death penalty requires a ‘greater
22 degree of reliability’ when it is imposed.” Murray v.
23 Giarratano, 492 U.S. 1, 8-9 (1989) (internal citations omitted);
24 see also Monge v. California, 524 U.S. 721, 732 (1998) (observing

1 that there is an "acute need for reliability in capital
2 sentencing proceedings"); Simmons v. South Carolina, 512 U.S.
3 154, 161-62 (1994); Lowenfield v. Phelps, 484 U.S. 231, 238-39
4 (1988); Beck v. Alabama, 447 U.S. 625, 638 (1980); Gardner v.
5 Florida, 430 U.S. 349, 357, 362 (1977); and Woodson v. North
6 Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) ("Because
7 of th[e] qualitative difference [between a death sentence and
8 life imprisonment], there is a corresponding difference in the
9 need for reliability in the determination that death is the
10 appropriate punishment in a specific case.").

11 What the district court failed to acknowledge, however, is
12 that the Supreme Court has also made clear that in order to
13 achieve such "heightened reliability," more evidence, not less,
14 should be admitted on the presence or absence of aggravating and
15 mitigating factors:

16 We think that the Georgia court wisely has chosen not
17 to impose unnecessary restrictions on the evidence that
18 can be offered at [a death penalty] hearing So
19 long as the evidence introduced . . . at the
20 presentence hearing do not prejudice a defendant, it is
21 preferable not to impose restrictions. We think it
22 desirable for the jury to have as much information
23 before it as possible when it makes the sentencing
24 decision.

25 Gregg v. Georgia, 428 U.S. 153, 203-04 (1976) (internal citations
26 omitted). This statement in Gregg follows a long line of Supreme
27 Court cases that have emphasized the importance of allowing the
28 sentencing body to have full and complete information about the

1 defendant. In Williams v. New York, for example, the Court
2 stated that "modern concepts individualizing punishment have made
3 it all the more necessary that a sentencing judge not be denied
4 an opportunity to obtain pertinent information by a requirement
5 of rigid adherence to restrictive rules of evidence properly
6 applicable to the trial." 337 U.S. 241, 247 (1949).

7 Facts relevant to sentencing are far more diffuse than
8 matters relevant to guilt for a particular crime. Adjudications
9 of guilt are deliberately cabined to focus on the particulars of
10 the criminal conduct at issue and to avoid inquiries into
11 tangential matters that may bear on the defendant's character.
12 See id. By contrast, in determining the appropriate punishment,
13 it is appropriate for the sentencing authority, whether jury or
14 judge, to consider a defendant's whole life and personal make-up.
15 See id. ("Highly relevant – if not essential – to [the] selection
16 of an appropriate sentence is the possession of the fullest
17 information possible concerning the defendant's life and
18 characteristics."). The Supreme Court has stated that in
19 "determin[ing] whether a defendant eligible for the death penalty
20 should in fact receive that sentence[, w]hat is important . . .
21 is an individualized determination on the basis of the character
22 of the individual and the circumstances of the crime." Tuilaepa
23 v. California, 512 U.S. 967, 972 (1994) (emphasis in original)
24 (internal quotation marks omitted).

1 The FDPA Standard comports with the reasoning of Williams
2 and its progeny by excluding only evidence whose probative value
3 is outweighed by the danger of unfair prejudice to the defendant.
4 This prescription permits the admission of evidence that might be
5 excludable under the FRE but is nevertheless both
6 constitutionally permissible and relevant to the determination of
7 whether the death penalty should be imposed in a given case.
8 This standard permits "the jury [to] have before it all possible
9 relevant information about the individual defendant whose fate it
10 must determine." Jurek v. Texas, 428 U.S. 262, 276 (1976). As a
11 result, the FDPA does not undermine "heightened reliability," it
12 promotes it.

13 In concluding that the FDPA eliminates a defendant's
14 constitutional rights to due process and to confront and cross-
15 examine witnesses against him at the sentencing hearing, the
16 district court mistakenly assumed that the FRE are the only means
17 to safeguard these rights and to provide the "heightened
18 reliability" necessary in imposing a sentence of death. In doing
19 so, the district court effectively equated the FRE with a
20 defendant's Constitutional Rights. See Fell, 217 F. Supp. 2d at
21 489 ("Congress has explicitly and unambiguously provided that the
22 [FRE] do not apply . . . , and thus by necessary implication that
23 a defendant does not have confrontation or cross-examination
24 rights at a capital sentencing proceeding.").

1 The FRE, however, do not set forth the constitutional
2 parameters of admissible evidence, nor does a criminal defendant
3 have a constitutional right to have the FRE in place. Indeed,
4 the FRE are inapplicable in several criminal proceedings,
5 including sentencing proceedings before a judge. See Fed. R.
6 Evid. 1101(d).⁴ Moreover, the FRE generally afford broader
7 protection than required by the Constitution by excluding
8 evidence that would be constitutionally permissible. See, e.g.,
9 Dowling v. United States, 493 U.S. 342, 352-54 (1990) (holding
10 that admission of evidence in violation of Fed. R. Evid. 404(b)
11 did not violate defendant's right to due process); Ryan v.
12 Miller, 303 F.3d 231, 247 (2d Cir. 2002) ("[N]ot all assertions
13 that hearsay rules prohibit will run afoul of the Confrontation
14 Clause."). Conversely, some evidence that would be admissible
15 under the FRE or other evidentiary rules would run afoul of

⁴ Rule 1101 of the Federal Rules of Evidence is entitled "Applicability of Rules." Subsection (d) of the rule provides, in relevant part,

Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

(1) **Preliminary Questions of fact.**

(2) **Grand Jury.**

(3) **Miscellaneous proceedings.** [P]reliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

1 constitutional principles. See, e.g., Chambers v. Mississippi,
2 410 U.S. 284, 302 (1973) (“[W]here constitutional rights directly
3 affecting the ascertainment of guilt are implicated, the hearsay
4 rule may not be applied mechanistically to defeat the ends of
5 justice.”); cf. Green v. Georgia, 442 U.S. 95, 97 (1979)
6 (“Regardless of whether the proffered testimony comes within
7 . . . [Georgia’s] hearsay rule, under the facts of this case its
8 exclusion constituted a violation of the Due Process Clause . . .
9 .”). Thus the FRE establish neither the floor nor the ceiling of
10 constitutionally permissible evidence.

11 Instead, as the district court conceded, Fell, 217 F. Supp.
12 2d at 489, Congress has the authority to set forth rules of
13 evidence in federal trials subject only to the requirement that
14 the rules comport with the Constitution, and it may “modify or
15 set aside any judicially created rules of evidence and procedure
16 that are not required by the Constitution.” Dickerson v. United
17 States, 530 U.S. 428, 437 (2000); see also United States v.
18 Scheffer, 523 U.S. 303, 308 (1998); Tot v. United States, 319
19 U.S. 463, 467 (1943). It was this authority that allowed
20 Congress to promulgate the FRE in the first place, and it is this
21 authority that permits Congress to forgo their application under
22 the FDPA. So long as the FDPA Standard provides a level of
23 protection that ensures that defendants receive a fundamentally
24 fair trial, the act satisfies constitutional requirements. That

1 requirement is certainly met, given that the balancing test set
2 forth in the FDPA is, in fact, more stringent than its
3 counterpart in the FRE, which allows the exclusion of relevant
4 evidence "if its probative value is substantially outweighed by
5 the danger of unfair prejudice, confusion of the issues, or
6 misleading the jury." Fed. R. Evid. 403 (emphasis added). Thus,
7 the presumption of admissibility of relevant evidence is actually
8 narrower under the FDPA than under the FRE.

9 Moreover, as was true before the FRE were promulgated in
10 1972 and is true under the FRE, it remains for the court, in the
11 exercise of its judgment and discretion, to ensure that
12 unconstitutional evidence otherwise admissible under applicable
13 evidentiary rules is excluded from trial. The FDPA does not
14 eliminate this function of the judge as gatekeeper of
15 constitutionally permissible evidence; nor does it alter or
16 "eliminate the constitutional baseline for the admissibility of
17 evidence in a criminal trial." United States v. Matthews, 246 F.
18 Supp. 2d 137, 144-45 (N.D.N.Y. 2002). To the contrary, under the
19 FDPA Standard, "judges continue their role as evidentiary
20 gatekeepers and[, pursuant to the balancing test set forth in
21 § 3593(c),] retain the discretion to exclude any type of
22 unreliable or prejudicial evidence that might render a trial
23 fundamentally unfair." United States v. Battle, 264 F. Supp. 2d
24 1088, 1106 (N.D. Ga. 2003); see also United States v. Johnson,

1 239 F. Supp. 2d 924, 946 (N.D. Iowa 2003) (holding that the FDPA
2 “expressly supplants only the rules of evidence, not
3 constitutional standards [The trial court] retains the
4 authority under the statute to impose upon the parties any
5 standards of admissibility or fairness dictated by the Fifth and
6 Sixth Amendments”) (emphasis in original). In the instant case,
7 then, if the district court were to conclude that admission of
8 statements by Fell’s deceased co-defendant would unfairly
9 prejudice Fell, it would be obligated by the FDPA Standard to
10 exclude them. We, of course, take no position on the question.

11 In short, as the Fifth Circuit observed in Jones, the FDPA
12 Standard “does not impair the reliability or relevance of
13 information at capital sentencing hearings.” 132 F.3d at 242.
14 Rather, it “helps to accomplish the individualized sentencing
15 required by the constitution.” Id. Accordingly, we agree with
16 the numerous courts that have held that the FDPA Standard set
17 forth in § 3593(c) meets constitutional requirements. See, e.g.,
18 id. at 241; United States v Haynes, 269 F. Supp. 2d 970, 983-87
19 (W.D. Tenn. 2003); Battle, 264 F. Supp. 2d at 1105-07; United
20 States v. Davis, No. CR.A.01-282, 2003 WL 1837701, at *11 (E.D.
21 La. April 9, 2003); Johnson, 239 F. Supp. 2d at 944-46; Matthews,
22 246 F. Supp. 2d at 141-46; United States v. Regan, 221 F. Supp.
23 2d 672, 681-83 (E.D. Va. 2002); United States v. Miner, 176 F.
24 Supp. 2d 424, 435-36 (W.D. Pa. 2001); United States v. Cooper, 91

1 F. Supp. 2d 90, 98 (D.D.C. 2000); United States v. Frank, 8 F.
2 Supp. 2d 253, 267-71 (S.D.N.Y. 1998); United States v. Nguyen,
3 928 F. Supp. 1525, 1546-47 (D. Kan. 1996); United States v.
4 McVeigh, 944 F. Supp. 1478, 1487 (D. Colo. 1996).

5 CONCLUSION

6 For the foregoing reasons, we vacate the judgment of the
7 district court and remand for further proceedings consistent with
8 this opinion. In particular, to avoid further piecemeal
9 litigation, we instruct the district court to collectively
10 dispose of all of the defendant's remaining pre-trial challenges.